IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 61 of 2006
With
COMPANY PETITION No. 62 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE ANANT S.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DOSHI CASTINGS PVT.LTD. - Petitioner(s)
Versus
... - Respondent(s)

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Appearance :
MRS SWATI SOPARKAR for Petitioner(s) : 1,
MR PAVAN S GODIAWALA for Respondent(s) : 1,
MR PURVISH J MALKAN for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANANT S.DAVE

Date : 30/10/2006

CAV JUDGMENT

1. This petition is preferred for sanctioning the scheme of arrangement in the nature of Scheme of

Amalgamation Doshi Castings Pvt. Ltd., Transferor Company with Gujarat Technocastings Pvt. Ltd., Transferee Company, under Sections 391 and 394 of the Companies Act, 1956.

2. It is stated that as per the audited balance-sheets on 31st March, 2005 and as per the provisional balance-sheet as on 31st December, 2005, Authorized Share Capital is Rs.30 lacs consisting of three lacs equity shares of Rs.10/- each and issued, subscribed and paid-up capital is Rs.20/- lacs consisting of two lacs equity shares of Rs.10/- fully paid. The objection, for which the petitioner company was incorporated are set out at Annexure-'A' to the petition and one of the incidental objection for attainment of main object is found in Clause-10 which is pertaining to amalgamation. It is stated that the petitioner company was incorporated on 03.06.1998 as a Private Limited Company and mainly engaged in the business of Manufacturing of steel castings. It is stated that commercial production was started in the year 1999-2000 and the turn over of the company was for the financial year 2004-05 was more than Rs.2 Crores, however, the company has also started making profit for the said financial year.

So far as Transferee Company, Gujarat

Technocastings Pvt. Ltd. is concerned, it is one of the leading and a well reputed Alloy steel Foundry and for the financial year 2004-05 its turn over was Rs.12 Crores and net profit of Rs.10 lacs with reserves and surplus of more than Rs.22 lacs for the very same period.

3. That Board of Directors of both the companies thought it fit to amalgamate the above companies for achieving synergic advantages and to combine all the operations under one company to make the administration and management of both the companies also effective and efficient so as to maximize its profit through optimum utilization of its resources and amalgamating the administrative and operative costs.

Accordingly, the scheme of amalgamation is framed which is produced at Annexure:-'C' to the petition.

4. Smt Swati Soparkar, ld. Advocate appearing for the petitioner canvassed her submissions on the basis of the above scheme and submitted that the salient features of the said scheme provide various clauses, containing definition, transfer and vesting, contract, deeds, bonds and other instruments, about

legal proceedings to continue against the Transferor Company till effective date. It further provide operative debts of scheme with regard to staff and workmen of the Transferor Company. So far as Clause-8 is concerned, it is with regard to issue of shares by the Transferee Company which reads as under:-

ISSUE OF SHARES BY THE TRANSFEREE COMPANY:-

(a) Upon the coming into effect of the Scheme, in consideration of the transfer and vesting of the Undertaking and the liabilities of the Transferor Company to the Transferee Company in terms of this Scheme, subject to what is provided for in clause 3(f)above, the Transferee Company shall, without any further application, act or deed, issue and allot at par, the Equity Shares of Rs.100/- (Rupees One Hundred Only) each credited as fully paid-up in the Capital of the Transferee Company tot he equity shareholders of the Transferor Company whose names are recorded in the Register of Members of the Transferor Company, on the Record Date, or to such of their respective heirs, executors, administrators or other legal representatives or other successors in title as may be recognized by the Board of Directors of the Transferee Company approved by them to be placed on its register of names in the following proportion: 1(One) Equity Share of Rs.100/- each credited as fully Paid up of the Transferee Company i.e. Gujarat Technocastings Private Limited shall be issued and allotted at par against 15(Fifteen) Equity Shares of Rs.10/- each to the Shareholders of the Transferor Company i.e. Doshi Castings Private Limited, whose names are recorded in the Register of Members, or their heirs,

executors, administrators or other legal representatives or their successors in title as the case may be, for Equity Shares held by the said Shareholders in the Transferor Company.

The said new Equity Shares all rank for voting rights and in all other respects pari-passu with the Equity Shares of the Transferee Company.

(b) The fractions arising due to the above Exchange Ratio shall be treated as under:-

No fractional entitlements shall be issued by the Transferee Company in respect of the fractional entitlements, if any, to which the members of any of the Transferor Company may be entitled on issue of allotment of the shares by the Transferee Company as aforesaid. The directors of the Transferee Company shall instead consolidate all such fractional entitlements and allot shares in lieu thereof to a Director or an Authorized officer of the Transferee Company with the express understanding that such Director or the Officer shall sell the same at the best available price in one or more lots and by private sale/placement or by auction as deemed fit (the decision of such director or the officer as the case may be as to the timing and method of the sale and the price at which such sale has been given effect to shall be final) and pay the sale proceeds to the Transferee Company. The net sale proceeds thereupon, shall be distributed among the respective members of the Transferor Company in proportion of their fractional entitlements by the Transferee Company.

(c) For the purpose as aforesaid the Transferee

Company shall, if and to the extent required, increase its Authorized Capital after the Scheme has been sanctioned by the High Court but before the issue and allotment of shares. It shall also, if and to the extent required, apply for and obtain the requisite approvals including that of SEBI, Reserve Bank of India and other appropriate authorities concerned for issue and allotment by the Transferee Company to the respective members of the Transferor Company of the Equity Shares in the said re-organized share capital of the Transferee Company in the ratio as aforesaid.

(d) The issue and allotment of Equity Shares in the Transferee Company to the members of the Transferor Company as provided in the Scheme shall be deemed to have been carried out by following the procedure laid down under Section 81(1A) and other applicable provisions of the Act.

(e) Upon issuance and allotment of the Equity Shares by the Transferee Company to the members of the Transferor Company as provided in the Scheme, the existing Equity Shares held by the members of the Transferor Company shall automatically stand cancelled/extinguished.”

That various clauses are with regard to accounting treatment in the books of Transferee companies and modification amendment to the Scheme and approval that may be accorded by the High Court etc.

5. According to Mrs.Soparkar, learned advocate appearing for the petitioner, respective board of directors of both the companies have approved the above scheme of arrangement and sofaras unsecured trade creditors of the petitioner company had already given their consent in writing for agreeing to the scheme of amalgamation and had also given their rights to attend the meeting and all the past secured loans were paid up, and order came to be passed in Company Application No.125 of 2006 on 17.03.2006 by which the learned Single Judge was pleased to dispense with the holding of such meeting of the unsecured trade creditors, and therefore, no such meeting was called. Since by the very same order petitioner company was directed to convene separate meetings of equity share holders and unsecured loan creditors of the company, one of the directors came to be appointed as a Chairman of the meetings and notices of meetings as required under Section 393 of the Companies ACT, 1956 alongwith the explanatory statement were sent individually to all equity share holders and unsecured loan creditors of the company. That notices of the meetings were also advertised in “Indian Express” English daily and “Loksatta-Jansatta” Gujarati Daily, both Ahmedabad editions on 29.03.2006. That meetings of equity share holders and unsecured loan creditors was duly

convened under the Chairmanship of one Shri Suresh Doshi and report of the chairman is also submitted and is on record of this case. The report of the chairman alongwith the affidavit is annexed at Annexure:-'E' at Pages 41 to 51 to this petition and accordingly in the meeting of equity share holders 19 equity shareholders of the said company attended which valued at Rs.17,00,800/- being 1,71,800 equity shares of Rs.10/- each and the resolution was passed approving the scheme was carried out unilaterally i.e. 100% in number and 100% in value of the equity shareholders.

6. It is further submitted by Mrs.Soparkar, learned advocate appearing for petitioner that however in the meeting of unsecured loan creditor was attended 51 unsecured loan creditor in person and/or through proxy and total value of their debts of Rs.1,22,70,515/- and resolution was carried out in support of the scheme by requisite majority i.e. 93.33% in number and 98.96% in value of the above class. Voting in favour of the meeting, except opposition by one ballet having valued of debt of Rs.1,27,134.

7. Learned counsel for the petitioner further submitted that in the Company Petition No.61 of 2006, order

came to be passed on 04.05.2006 having noted that the above fact of scheme being approved by the requisite statutory majority the petition came to be admitted and directions were given that let admission of the petition be advertised in two daily newspapers i.e. “Indian Express” English Daily and “Loksatta-Jansatta” Gujarati Daily, both of Ahmedabad Editions and be heard finally on 29th June, 2006. Accordingly, the affidavit of publication is filed on 08th June, 2006 by which it is stated on oath that the directions contained in order dated 04.05.2006 are complied with.

8. That upon issuance of notices to Regional Director, Ministry of Company Affairs, Western Region, Government of India has addressed a letter dated 10th July, 2006 to the Registrar of Companies, Ahmedabad, which revealed that the Regional Director had decided not to oppose the said petition and to file affidavit on behalf of his office to this High Court and accordingly affidavit dated 14th July, 2006 is filed by Deputy Registrar of Companies and the same is placed on record by the petitioner. Even report of the Official Liquidator on 29th June, 2006 clearly mentions that acts and transactions of the company are conducted within the objections mentioned in the Memorandum of Association of the company and the

affairs of the company have not been conducted in a manner prejudicial to the interest of the members or the public at large. Thus, the requirement of Sections 391 to 394 of the Companies Act, 1956 have been fulfilled by the company and the scheme is placed for sanction by this Court.

9. *Per Contra,* Shri A.L.Shah, learned counsel appearing for the objector Shri Prkash Jesinglal Doshi, a shareholder, made various submissions, objecting the scheme and referred to the affidavit and submitted that the scheme at Annexure:-'C' is concerned, the petitioner company has not disclosed all material facts as required under Clause (a) of Sub-section (i) of Section 393 of the Act. It is submitted that Clause-13 of explanatory statement sent alongwith notice convening the meetings of shareholders and creditors mentions that the directors of the Transferor and Transferee Company have no interest in the scheme except as share holder in general. But, in fact, the above statement is a misstatement and suppresses vital fact that the directors of both the Transferor Company and Transferee Company and their clause relative have loan/deposit claims from the Transferor Company and details with regard to the above loan/deposits is mentioned in Para:-4 of the above affidavit in reply. Thus, according to the

objector, vital and material facts of above nature is concealed and the same is not reflected in the explanatory statement sent alongwith the notice, the scheme does not require any sanction by this Court. It is also averred that the scheme is proposed with ulterior motive in view of the fact that the Transferor Company has accumulated losses and about Rs.70,82,628/- against the paid-up capital of Rs.20 lacs and it has no reserve and the Transferee Company has substantial reserve and therefore, the Directors of the Transferor Company want to utilize such reserve and funds of the Transferee Company, the scheme is proposed at Annexure:-'C'.It is further averred that the petition does not disclose the material interests with regard to the financial position of the company as required under Clause (a) of Subsection (1) of Section 393 of the Companies Act, 1956 and even exchange ratio fixed is also not fair, since the petitioners have got the same value without making any provision for depreciation on fixed assets and even plant and machineries are not properly valued. It is also averred that there are violation of various accounts in standard and main object clauses of both the companies do not confer any power for amalgamation and thus overall scheme is not required any approval by this Court.

10. Learned counsel for the petitioner submitted that above objections are meritless and referred to the affidavit in rejoinder filed by one of the Directors of the petitioner company that the objector was Executive Director of the Transferee Company i.e. Gujarat Technocastings Pvt Ltd. till December' 2005 and also a member of Doshi family, who constitute the management of the said company. That in his tenure as the Executive Director of the companies, certain financial meetings amendment was noticed and therefore Board of Directors thought it fit that commercial activities and financial affairs to be supervised by two other brothers of the objector and thereafter substantial improvement was noticed in the performance. Accordingly, in the year 2004-06 cash profit was estimated to Rs.62.69 lacs and in the year 2005-07 the same would be about Rs.1 Crore. That request of the objector to increases the salary was not acceded, the objector in the nature of this affidavit have been filed out of vengeance and therefore the objector has not approached this Court with clean hands and his intention is not bona-fide.

It is further submitted that as per the requirement of Clause (a) of Subsection 1 of Section 393 of the Companies Act, 1956, the material

interest of all the directors required to be disclosed, only if an insofar as, it is different from the effect of on the like interest of other persons. It is also submitted that there was specific purpose for the scheme to be framed and it is already reproduced in the petition. Even audited balance-sheet of both the companies i.e. On 31.03.2005 and 31.12.2005 are on record and the allegations with regard to utilization of reserves of the Transferee Company it is submitted that the same can never be used for the purpose of repayment of the loan of Directors and procedure as required under Section 391 to 394 is duly followed and it is further stated that no investigation is pending in relation to company under Section 235 to 251 of the Companies Act. That share exchange ratio is determined by following correct methods and the same is part of the record and there is no violation of any accounting standard. It is stated that the valuation has taken into consideration made by the expert Government approved valuer to arrive at the fair market value of the assets and therefore no necessity to make separate provision for depreciation, thus, according to the Scheme at Annexure:-'C' required to be sanctioned.

11.Shri A.L.Shah, learned counsel appearing for the

objector relied upon decision reported in **1961 (Vol.II) GLR 681** in the case of **The Siddhpur Mills Company Ltd.** and submitted that it is incumbent upon the petitioner company to disclose material interest of the Directors as required in Clause (a) of Subsection (1) of Section 393 of the Companies Act, 1956. According to Shri A.L.Shah, learned counsel it is held in the above case that above clause (a) of Subsection 1 of Section 393 of the Companies Act, 1956, is divided into two principal parts. The first part requires not only that the terms of the scheme must be stated, but it further requires that effect of the scheme must be explained. Therefore, the interests which the Directors have to mention in the statement are not only the interest which they hold as directors, but any other interests which other possess in the capacity under Clause (a) of Subsection (1) of Section 393 of the Companies Act, 1956 and the effect of such interests on the scheme also to be mentioned in the statement, if and sofar as that effect different from the material interest which any other person interested in the scheme may have.

That the second part of Clause (a) of Subsection 1 of Section 393 of the Companies Act, 1956 requires that the statement after mentioning the material

interest of the concerned person must compare those material interest that the material interests of the other person and if a comparison of two sets of interests reveals that the effect of the scheme on the concerned person is different from its effect on the non-concerned persons, then that effect must also be mentioned in the scheme.

He has also relied upon another decision reported in **40 Company Cases 819** in the case of **Maneckchowk Mills and Ahmedabad Manufacturing Co. Ltd.** and **1972 Company Cases 265** in the case of **Navjivan Mills Co.Ltd., Kalol,** where this Court reiterated the above principles laid down by learned Single Judge in **Siddhpur Mill's case** and found discloser of material interest by director is must.

Thus, according to Shri A.L.Shah, learned senior counsel, in the present case, in Clause-13 of explanatory statement loan/deposits claim by the Directors and that fact is not mentioned or disclosed as required by Clause (a) of Subsection 1 of Section 393 of the Companies Act, 1956. The procedure as required that the requirement of the above section remain unfulfilled and therefore scheme does not deserve to be sanctioned by this

Court. According to him, the petitioner has suppressed vital interest by making wrong statement that Directors of Transferor and Transferee Companies have no interest in the scheme and therefore scheme deserves non approval by this Court.

12. Shri A.L.Shah, learned Senior Counsel appearing for the objector has also raised objection with regard to the fixation of exchange ratio on the grounds raised in the affidavit-in-reply filed by the objector and submitted that the above exchange ratio does not reflect correct valuation and the methods and system and the same is in violation of accounting methods and standard laid down by the Chartered Accountant of India.

13. Mrs. Swati Soparkar, learned advocate appearing for the petitioner relied upon certain observations of Miheer Mafatlal case reported in (**Vol.87) Company Cases 792 in case of Miheer Mafatlal** and submitted that all the parameters laid down in the above case by the Apex Court have been fulfilled by the petitioner company and she has relied upon particularly placitum “D” and “E” of Para:1 at Page:823 of the above judgment and submitted that the plain reading of Clause (a) of Subsection 1 of

Section 393 envisage discloser of special or material interests of the Directors only when the same is likely to be affected by the scheme and if non-discloser of such an interest is likely to affect the voting pattern of class of the Creditors or shareholders to vote on the scheme, then only such special interest of the director is required to be communicated to the voters as per Section 393 (i) (a) of the Companies Act, 1956. According to her, in the present case, in Clause-13 of explanatory note, it is clearly mentioned that directors of the Transferor and Transferee Company have no interest in the scheme except as shareholder in general. She has emphatically submitted that loan/deposits claims of the Directors of the companies, in the present case is not different then that of shareholder in general, and therefore, there was no reason to communicate the same alongwith the notice convening the meetings. She has further submitted that all the balance-sheet with regard to financial position of the companies are on record of the petition and the same was kept available for inspection at the registered office of the company, and therefore no grievance can be made in this regard.

14. According to Smt. Soparkar, learned advocate appearing for the petitioner, exchange ratio fixed

by the expert need not require further scrutiny by this Court in view of decision of **Miheer Mafatlal (Supra)** and further as per law laid down by **Hindustan Lever Employees' Union Vs. Hindustan Lever Ltd. and Ors.** reported in **1995 Suppl (1) SCC 499.** She has further submitted that in the present case an expert Chartered Accountant has relied upon standard value methods for valuating a company or its equity shares. As per the expert, mainly three methods are in existence i.e. (i) net assets method, (ii) valuation on the basis of earning capacity and discounted case law method **(DCF).** That the fair value was arrived by the expert on the basis of the above methods and share exchange ratio was determined which indicate correct value of the company and its equity shares which do not require any alteration by this Court and scheme at Annexure:-'C' required to be sanctioned.

15. Having heard the learned counsel for the respective parties, on perusal of the records including the balance-sheet as on 31.12.2005 of Transferor and Transferee Companies, Memorandum of Association at Annexure:-'B', the scheme at Annexure:-'C' containing various clauses, the report of the Chairman of the meeting, report filed by the

Official Liquidator and a letter written by the Regional Director of Ministry of Company Affairs, affidavit and additional affidavit filed by the objector and the rejoinder filed by the petitioner, I am inclined to sanction the scheme at Annexure:-C to this petition, which is just, fair, reasonable and in interest of class of share holders and creditors and overall in the public interest.

16. That for sanction of a scheme by the Company Court require fulfillment of compliance with provisions of Section 391 to 394 of the Companies Act, 1956 and other relevant provisions depending on the structure, nature and object of the scheme. In the present case, the object is already mentioned when the Board of Directors approved the scheme which is for synergic advantages to be gained by the company after amalgamation so as to have better administrative and managerial control of the company. It further envisages overall growth of the company and the same is also reflected in relevant clause 10 of Memorandum of Association.

17. Even the scheme is not objected by the Regional Director of Ministry of Company Affairs and the report of the Official Liquidator indicates that affairs of the company are being run in a manner not

prejudicial to the company or to the interest of the public at large. Therefore broadly two conditions remain to be examined by this Court about compliance of requirement of Clause (a) of Subsection 1 of Section 393 of the Companies Act, 1956 and fixation of exchange ratio determined by the valuer and the expert.

18. The provision of Clause (a) of Subsection 1 of Section 393 of reads as under:-

Section-393. Information as to compromises or arrangements with creditors and members.

> (1) Where a meeting of creditors or any class of creditors, or of members or any class of members, is called under Section 391,--
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> **(a)** with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect, and in particular, stating any material interests of the directors, managing directors, or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests of the compromise or arrangement, if, and in so far as , it is different from the effect on the like interests of other persons;“

Thus, the reading of the above Section makes it amply clear that every notice calling the meeting to be sent with a statement stating any material interests of the Director, Managing Director of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests, if and sofar as, it is different from the effect on the like interests of other persons. Thus, requirement of mentioning material interests of directors and the effect on those interests if an insofar as, it is different from the effect from the like interests of other persons only.

In the present case, facts about deposits/loan by directors of the companies, as mentioned in Para:4 of reply, cannot be said to be different than that of the shareholders and therefore there is a compliance of Section 393(1) (a) of the companies Act, 1962.

19. It is to be noted that interpretation of the above section has done by the learned company judges in **Siddhpur Mills, Navjivan Mills and Maneckchowk Mills** and the proposition of law laid down by the above

judgments, there cannot be any other opinion. At the same time, this Court has to examine the relevant facts in the backdrop of above principles of law laid down by this Court.

20. Accordingly, in the present case, loan/deposits by the Directors of the company if perused, cannot be said to have different then that of other shareholders and in any case resulting into affecting the scheme or vis-a-vis. That the material interests of the directors and not the relatives to be seen which require to be disclosed only if an insofar as, it is different from the effect on the like interests of other persons. If Para:4 of the reply of the objector is seen, the interests of the directors as creditors are not to be treated as different in any manner then their loan creditors. Therefore the above objections have no merits. So far as the Apex Court is concerned, it is laid down that only if material interests of the directors is different then like interests of other persons then the communication is necessary which may have bearing on the voting pattern. In the present case, when a huge majority has approved the scheme which represent 93.33% in number and 98.96% in value of the unsecured loan creditors and 100% of shareholder, collective and commercial wisdom of the

stake holder do not require any modification or alteration by this Court and the objection of the objector in this regard is overruled.

It is to be noted that 6th Annual Report for the year 2004-05 indicate in the Schedule, forming part of accounts, particularly Schedule-IV is about unsecured loans mentions about deposits taken from Directors likewise Schedule VI also mentions about current assets loan and advances. That after Account for the year ended on 31st December, 2005 also reflect in Schedule Iv deposits from the Directors and even account books were kept open for the inspection of the concerned stakeholders at the office of the companies, and therefore, any vigilant or inquisitive stakeholders could have verified the details about the loans advanced by the Directors or otherwise, and therefore, it cannot be said that any material interests suppressed by the Directors. However, we are concerned with the disclosure of materials interests by the Directors of the companies as required under Clause-(a) of Sub-section (1) of Section 393 of the Companies Act, 1956. Only if such material interest is different then like interests of other persons and in the present case, the above loan deposits by the Directors cannot be placed on higher pedestal and

therefore also Clause-13 of the Explanatory Statement does not suffer from non-compliance of Clause-(a) of Subsection (1) of Section 393 of the Companies Act, 1956.

Thus, mentioning in Clause-13 of explanatory statement sent alongwith the notice convening the meeting of shareholders and creditors that " the Directors of the Transferor and Transferee Company have no interests in the scheme except as shareholders in general" cannot be said to be a misleading or in any way contrary to the provisions of Clause (a) of Subsection (1) of Section 393 of the Companies Act, 1956.

21. As discussed earlier in above para-4 regarding the Clause-8 of the Scheme, the fixation of share exchange ratio is also just, proper and arrived at by the valuation by applying standard methods of valuation of companies or its shares and the same is very well reflected from the record as per Clause-8 of the Scheme, referred to in Para:-4 of the present judgment, which do not require any interference by this Court. Thus, this share exchange ratio recommended by the Chartered Accountant and the expert by applying valuation methods i.e. (i) net assets method, (ii) valuation on the basis of

earning capacity and discounted case law method and after assigning weights to all the valuation methods is in consonance with law laid down by **Miheer Mafatlal's case (Supra)** and **Hindustn Lever's case (Supra),** which also do not require any interference by this Court.

That even use of the reserve of the Transferee Company by the Directors for repayment of deposits is also not a valid objection, since reserve of the company can be used for specific purpose only, which may be determined by the Board of Directors in accordance with the provisions of Company Law.

Since no other serious allegations have been raised by objector, the scheme at Annexure-C is hereby sanctioned being just, fair and in the interest of stake holders of the public at large. The present Company Petition No.61 of 2006 and 62 of 2006 stand allowed.

22. The fees of the learned Assistant Solicitor General of India is quantified at Rs.3500/-to be paid by the petitioner-company.

(ANANT S. DAVE, J.)

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